165-553

165-533

165-533

Office Supreme Court, U. S.
FILED.
JAN 2 1897
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DAVID G. SWAIM, APPELLANT,
v.
THE UNITED STATES. } No. 33.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DAVID G. SWAIM, APPELLANT,
v.
THE UNITED STATES. } No. 33.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

The appellant seeks to reverse a judgment rejecting his claim for $23,340, the amount of arrearages of pay and allowances alleged to be due him as Judge-Advocate General for the period from February 24, 1885, to the filing of his petition, February 24, 1895, and which were withheld by virtue of the sentence of a court-martial suspending him "from rank and duty for twelve years, and to forfeit one-half his monthly pay every month for the same period." This sentence the petition charged to be illegal and void because of both its constitution and its conduct.

The court-martial was instituted by direction of the President, upon the report of a court of inquiry ordered by him to investigate a charge of fraudulent conduct preferred against appellant in a communication form one A. E. Bateman to the Secretary of War. The court of inquiry was ordered after reference to the President by the Secretary of War of the communication and appellant's written explanation. (Rec., pp. 5–7.)

The charges formulated were: First. Conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war (Rec., p. 13); and second, neglect of duty, in violation of the sixty-second article of war. (Rec., p. 18.)

There was a conviction on parts of the first and third specifications of the first charge (for which see Rec., pp. 14 and 15).

Under the second charge there was but one specification, and that related to a matter altogether foreign to the subjects covered by said specifications under the first charge. (Rec., p. 18.) On the second charge and specification there was a finding of not guilty. (Rec., p. 19.)

The first specification under the first charge contains an allegation of a fraud attempted by the accused upon the banking firm of Bateman & Co. by the transfer to a third party of a memorandum of deposit given by said bankers to the accused July 15, 1882, said transfer having been made after he had, in the course of business, withdrawn nearly the entire sum represented by the memorandum of deposit and for the purpose of defrauding the bankers, the amounts so drawn not being credited thereon.

The court found all the material facts as alleged, but substituted the word *wrong* for fraud, so that the findings read substantially, "Thus attempting to commit a *wrong* upon said Bateman & Co. knowingly." (Rec., p. 18.)

By the third specification the accused was charged, in substance, with having prepared and forwarded to the Secretary of War a written communication in explanation of the transaction set forth in the first specification, which was evasive, uncandid and false, calculating and intending thereby to deceive the Secretary of War. The finding of the court as to this specification was guilty except in certain enumerated particulars.

As to the charge covering said first and third specifications, to wit, "conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war," the court found the accused "not guilty; but found him guilty of conduct to the prejudice of good order and military discipline, in violation of the sixty-second article of war." That is to say, the court found that the proof under the specifications of the first charge made out one of the lighter offenses described by the sixty-second article of war, but not that mentioned in the sixty-first.

The sixty-second article of war (Rev. Stat., sec. 1342) is as follows:

> All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

Upon these findings the court sentenced the accused to suspension from rank, duty, and pay for the period of three years. The President disapproved this sentence as incommensurate with the offense. (Rec., p. 23.) He also disapproved a second sentence as not authorized by law (Rec., p. 28), whereupon the sentence complained of was imposed and duly approved by the President (Rec., p. 29).

ARGUMENT.

The grounds for the claim that the sentence was a nullity are stated in the petition. (Rec., 1–4.) They are, in substance, that the President had no power to appoint the court-martial (par. 2); that the court-martial was constituted in violation of the seventy-ninth article of war (par. 3); that the claimant did not have a fair and impartial trial (par. 4); and that the findings of the court were insufficient to establish the commission of an offense (par. 5).

They will be considered in the order stated.

I.

THE PRESIDENT HAD FULL AUTHORITY TO APPOINT THE GENERAL COURT-MARTIAL IN QUESTION.

Appellant's contention is that the enumeration of certain officers as qualified to convene courts-martial confined the exercise of the power to such officers, and that the power to convene a general court-martial does not exist in the President except in the single instance specified in the seventy-second article of war, when the commander of an officer charged with an offense is himself the accuser or prosecutor.

The court-martial was convened by order dated June 30, 1884. (Rec., p. 11.) At that time the seventy-second article of war, as contained in Revised Statutes, section 1342, was in force. It was as follows:

> ART. 72. Any general officer, commanding the Army of the United States, a separate army, or a separate department, shall be competent to appoint a general court-martial, either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for his approval or orders in the case.

The claim that the power of the President to appoint general courts-martial was derived from and dependent upon the seventy-second article of war was first asserted in *Runkle's Case* (19 C. Cls. R., 396), decided April 7, 1884. The court held, by Drake, Ch. J. (pp. 407–409), that when authority to convene courts-martial was expressly granted to military officers the power was necessarily vested in the Commander in Chief of all military officers, the President of the United States. The court quoted from Winthrop's Digest (200, 388) and Ives on Military Law (p. 30) in support of the statement that the authority of the President to appoint general courts-martial had, in fact, been exercised from time to time from an early period.

The Chief Justice, in the course of the opinion, said:

> As Commander in Chief the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of

> an order to certain officers to assemble as a court, and, when so assembled, to exercise certain powers conferred upon them by the Articles of War. If this power could not be exercised, it would be impracticable, in the absence of an assignment of a general officer to command the Army, to administer military justice in a considerable class of cases of officers and soldiers not under the command of any department commander—as, for example, a large proportion of the officers of the general staff, and the whole body of the retired officers.

This court seems to have entertained the opinion that the point thus raised in Runkle's Case was not well taken, for it based its decision (122 U. S., 543), rendered May 27, 1887, on the failure of the record to show approval by the President *of the sentence of the court-martial.*

As a result, perhaps, of the question so raised as to the power of the President to appoint courts-martial, the matter was brought to the attention of the Senate in obedience to a resolution adopted by the Senate February 7, 1885, in the following words:

> *Resolved*, That the Committee on the Judiciary be directed to inquire and report to the Senate as to whether any legislation is required, and, if so, what, in regard to the appointment of courts-martial, and the regulations of proceedings and practice in trials before such courts in time of peace; *and whether, under existing law, an officer may be tried before a court-martial appointed by the President in cases where the commander of the accused officer to be tried is not the accuser.*

The Committee on the Judiciary reported on February 18, in substance, that, in its opinion, the power to appoint

general courts-martial, in the absence of legislation expressly prohibitive, was vested in the President, from the very nature of his office as Commander in Chief of the Army.

The report of the committee on this branch of the resolution is appended at the close of this brief.

The report of March 3, 1879, referred to in said report, was submitted by Mr. Edmunds from the Committee on the Judiciary, and was under a resolution requiring that committee, in effect, to report upon the legality of the reinstatement of Mr. Runkle. The legality of the constitution of the court was assumed in the report.

In its opinion in the case at bar (Rec., 33–38; 28 Ct. Cls. R., 218-224), the Court of Claims, by Judge Nott, presents the arguments in opposition to the view contended for by appellant so well that but little more need be said on this branch of the case.

Besides the text writers on courts-martial cited in the opinions heretofore mentioned to support the doctrine of the constitutional power of the President to appoint general courts-martial see *DeHart on Courts-Martial*, p. 5; and *Winthrop, Mil. Law*, pp. 61, 62; see also *note to 15 Opinions of Attorneys-General*, beginning at p. 297, where the subject is carefully considered and many cases are referred to, all of which sustain the position of the Government to the latter. The opinion of Attorney-General Devens, relates to the legality of the Runkle sentence, and though his conclusion that the sentence was properly approved by the President was not expressly concurred in by this court in its decision in 122 U. S., 543, yet his

general views seem subsequently to have met with favor. (*Ide* v. *United States*, 150 U. S., 517; *United States* v. *Fletcher*, 148 U. S., 84; and *United States* v. *Page*, 137 U. S., 673, 678.)

The phraseology of the *Act of May 29, 1830* (4 Stat., 417, chap. 179, set out verbatim in 19 C. Cls. R., 408, which subsequently became Rev. Stat., sec. 1342, art. 72), was very much like that of the ninety-second article of war (2 Stat., 370), where the general power of the President to appoint a court of inquiry was only inferentially expressed by a proviso limiting the power of a commanding officer to appoint courts of inquiry, when not demanded by the accused, to cases where the President directed the formation of such court. But, in the rearrangement and combining of parts of the two sections so as to constitute the one hundred and fifteenth article of war, as now set forth in the Revised Statutes, the authority of the President to appoint *any* court of inquiry was expressly stated.

So, we find in the act of 1862 establishing articles for the government of the Navy (Rev. Stat., sec. 1624) provisions similar to those contained in the Articles of War for the convening of summary courts-martial, courts of inquiry, and general courts-martial. The provision as to general courts-martial is as follows:

> ART. 38. General courts-martial may be convened by the President, the Secretary of the Navy, or the commander in chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President.

There is in this thirty-eighth article a more distinct expression of the legislative recognition of the President's constitutional prerogative as Commander in Chief of the Navy than is contained in the seventy-second article of war with reference to his powers as Commander in Chief of the Army with reference to general courts-martial; but the necessity and propriety of the right of the President to convene a general court-martial for the trial of officers of the Navy are not more clear than the necessity and propriety of such right with reference to the Army. There is no room for the inference that a necessity for the power existed in the one case and did not exist in the other.

The authorities do not support what the contention made by appellant in the court below imports, viz (Brief, p. 11), that at the time of the Declaration of Independence neither the British sovereign nor the commander of an army under him had power under the laws of England to appoint courts-martial, except as conferred by the annual mutiny act.

Winthrop, in his first volume of Military Law (p. 62), cites authorities in support of the claim that—

> By the common and statute law of Great Britain down to the period of the first mutiny act, the King was vested with the supreme command and government of the army, a function which necessarily included the power to constitute courts-martial.

The author expresses the opinion that this power, exercised from an early period, was not divested by the mutiny act of 1689. (See 1 McArthur on Courts-Martial, p. 22 *et seq.*)

But research into this historical question seems entirely unnecessary. The power of the President to appoint general courts-martial may well be derived directly from the constitutional provision which makes him Commander in Chief of the Army, the long and unquestioned exercise of the power, and its recognition by the two Houses of Congress in the tacit approval, by nonaction, of the views submitted in 1832 by the House Committee on Military Affairs (see 15 Opinions of Attorneys-General, 301) and the report of the Senate Judiciary Committee in 1885, above mentioned. It is not necessary, therefore, to inquire to what extent, if at all, Congress has authority to limit the right of the President in this regard, by virtue of its "power to make rules for the government and regulation of the land and naval forces." (Const., Art. I, sec. 8, par. 14.)

II.

THE OBJECTION THAT THE COURT-MARTIAL WAS CONSTITUTED IN VIOLATION OF THE SEVENTY-NINTH ARTICLE OF WAR CAN NOT BE RAISED IN THIS PROCEEDING.

The detailed grounds of this objection are thus stated in the paragraph of petition numbered 3, which reads as follows (Rec., 1):

> 3. Said court-martial was composed of five general officers and six colonels; that a condition of peace existed at the time and there were eighteen general officers of equal or superior rank to claimant available for detail on said court; that a number of the officers placed on the detail for the court were

> selected from those who were prejudiced against claimant or with whom he had, in the discharge of his official duty, expressed decided differences of opinion; that the detail of said six colonels who were inferior in rank to claimant could have been avoided, and said court-martial was constituted in violation of the 79th article of war.

The findings applicable to the objection now under consideration are numbers VII and VIII. (Rec., p. 30.) Finding VII consists of the roster of "Officers who held the rank of brigadier-general or higher rank in the United States Army on June 30, 1884, with their stations and status at that time as shown by the records of the Adjutant-General's Office."

The seventy-ninth article of war provides that—

> Officers shall be tried only by general courts-martial; and no officer shall, *when it can be avoided*, be tried by officers inferior to him in rank."

An objection similar to the one now under consideration was noticed by this court in *Martin* v. *Mott* (12 Wheaton, 19). The point was pressed that the particular court-martial whose acts were complained of was not composed of the proper number of officers required by law. The sixty-fourth and sixty-fifth articles of war then in force provided that "general courts-martial may consist of any number of commissioned officers from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service."

This court said (p. 35):

> Supposing these clauses applicable to the court-martial in question, it is very clear, that the act is

> merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive.

In *Mullan* v. *United States* (140 U. S., 240, p. 245) the court said:

> The courts must assume, nothing to the contrary appearing upon the face of the order convening the court, that the discretion conferred upon him (the convening officer) was properly exercised, and therefore that the trial of the appellant by a court, the majority of whom were his juniors in rank, could not be avoided "without injury to the service."

While the words "without injury to the service" are not contained in the seventy-ninth article of war, they are obviously implied.

Necessarily various considerations might enter into a determination of the question whether any of the persons qualified to sit in a court-martial should be detailed for that purpose, such, for instance, as their health and the question whether the public interests might not suffer or be imperilled by their detachment from their stations at the particular time. Nothing appears in the record tending to show that the detail of six colonels instead of officers of higher rank *could have been avoided*.

It is, however, submitted that the clause in question was simply directory.

Finding VIII was that—

> The claimant challenged the competency of a member of the court to sit on the trial for the cause

> stated, that claimant had severely criticised, officially injured, and animadverted upon the conduct of such challenged member in official reports. The challenge to such member was overruled, and he sat upon the trial as the president of the court.

The eighty-eighth article of war provides that—

> Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. *The court* shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

Even if it had been found by the court below that the alleged cause of challenge existed, still the determination of the *validity* of the challenge was committed by the Articles of War to the court-martial, and no judicial tribunal has been vested with jurisdiction to review it. Therefore, in this collateral proceeding, the action of the court-martial on the challenge in question is conclusive. But the error, if any, was not jurisdictional. It was a mere irregularity. (*Keyes* v. *United States*, 109 U. S., 336.)

III.

THE THIRD GROUND OF OBJECTION, THAT THE CLAIMANT DID NOT HAVE A FAIR AND IMPARTIAL TRIAL, CAN NOT BE RAISED COLLATERALLY.

The court below very properly held (Rec., p. 32) that—

> When the record of a court-martial comes into a civil court in a collateral way, the only questions which can be considered may be reduced to these three: 1st, was the court-martial legally constituted; 2d, did it have jurisdiction of the case; 3d, was the sentence duly approved and authorized by law.

In the paragraph of his petition numbered 4, claimant alleged that he "was deprived of a fair and impartial trial before said court-martial" by the disallowance of proper challenges to members; by improperly permitting counsel to assist the judge advocate; by the reception of illegal evidence; by the rejection of proper evidence; by alleged illegal, unjust, and oppressive action in referring to the court a second set of charges for trial before the conclusion of the trial on the first set; and by the action of the President in returning the case for further consideration, particularly in sending to the court the opinion of the then Attorney-General. Appellant also objects to the action of the court in reviewing the case without his presence or any opportunity to reply.

The findings covering these objections are Nos. VIII to XIV. (Rec., pp. 30, 31.)

Finding No. VIII has already been considered.

Finding XIV will be considered later.

All the other objections referred to arose out of the proceedings *during the trial*, after the court had acquired jurisdiction over the subject-matter and of the person; consequently, no matter how erroneous or how prejudicial to the accused such proceedings may have been, they are not subject to inquiry or review collaterally. (*Johnson* v. *Sayre*, 158 U. S., and cases cited; *United States* v. *Fletcher*, 148 U. S., 84.)

For instance, take the objection covered by the ninth finding, as follows:

> The judge advocate introduced and the court admitted a member of the bar to act as associate

counsel to the judge advocate to assist in the prosecution of claimant before said court-martial without the sanction or authority of the convening officer of the court, and such person acted in all respects as the official judge advocate in presenting the case for the prosecution.

While it is true, as stated by appellant, that article of war 74 provides that "officers who may appoint a court-martial shall be competent to appoint a judge advocate for the same," it is likewise true that article 90 authorizes the judge advocate, *or some person deputed by him*, "to prosecute in the name of the United States."

The finding implies that the judge advocate was present, and presumably he administered to the members of the court the oath specified in article 84. The presence of the judge advocate also implies that the attorney in question in "presenting the case for the prosecution" acted with the judge advocate's concurrence. No objection appears to have been taken at the trial to the appearance of associate counsel, and there is no claim that such counsel was guilty of any misconduct.

The facts in the case of *Brooks* v. *Adams* (11 Pick., 441), relied upon by claimant in the lower court, were totally unlike those in the case at bar. In that case a court-martial was held *without the presence* of a legal judge advocate, although the militia law of the Commonwealth required that a court-martial should consist of "a president, a judge advocate, a marshal, and at least three members."

In the analogous case of a proceeding for the violation of a criminal statute the employment of counsel to assist

in the prosecution is not error. (*People* v. *Walters*, 98 Cal., 138, 142; *Gardner* v. *State*, 55 N. J. Law, 17, 32; *State* v. *Crafton* (Iowa), 56 N. W., 257; *State* v. *Anderson*, 29 La. An., 774; *Roberts* v. *Commonwealth*, 94 Ky., 499.)

IV.

THE FACTS FOUND ESTABLISHED THE COMMISSION OF AN OFFENSE.

The objection that the findings of the court-martial were insufficient to establish the commission of an offense is stated in paragraph 5 of the petition in the following words (Rec., p. 2):

> 5. The findings of the court-martial, as set forth at pages 8, 9, 10, and 11 of said court-martial orders No. 19, are insufficient in law to show the commission of any crime or offense, military, civil, or moral; that the whole subject-matter embraced in said findings refers and pertains to claimant's personal dealings and transactions with Bateman & Co. referred to in said findings, and the court fails to find any facts or any lawful, sensible, or rational grounds showing evasion, uncandidness, or an intention to deceive the Secretary of War in said private and personal transactions; that said Bateman & Co. did a pretended business of buying and selling stocks on margin in the city of Washington, D. C., but said firm was in no manner connected with the War Department or military service of the United States, or under military protection as camp followers; that said findings in any event do not support the charge of conduct to the prejudice of good order and military discipline, in violation of the sixty-second article of war, or any other military charge known or recognized by the military code.

This branch of the case is considered in the opinion of Judge Nott, beginning at page 38 of the record. He did not agree with the Attorney-General's opinion (see record at pp. 23 to 28) that it was a matter of serious doubt whether, in view of the specific facts actually found by the court, it acted advisedly in refusing to find the defendant guilty, under the third and fourth specifications of the first charge actually preferred, of "conduct unbecoming an officer and a gentleman," and in substituting therefor the words "conduct to the prejudice of good order and military discipline." (Rec., p. 24.) The court, however, seems to have entertained no doubt of the legal right of the court-martial to make such a finding. (In this connection see authorities cited in the opinion of the Attorney-General, Rec., p. 24.) Judge Nott concluded this portion of his opinion with the following observations (Rec., p. 42):

> But while the court has carefully discarded all matters in the findings which can not, in its opinion, constitute an offense, it still appears that the claimant had prolonged and involved business transactions with these bankers not altogether consistent with the duties of his most responsible military position; that these transactions were so conducted as to require a lawsuit to bring them to an end, and to subject him to public charges of fraudulent practices; that while under these charges he withdrew the suit against the party who made them, apparently in consideration of his withdrawing his charges against the claimant; that when the letters charging the fraud and withdrawing the charge were referred to him for explanation he neglected to clear up the

> matter, and on the contrary gave an explanation which was uncandid and evasive, compelling the Secretary of War to take further steps toward removing the shadow which had fallen upon the reputation of the Army, and involving the Government in the expenses and inconveniences of a court of inquiry and a court-martial; that when an officer of whom he knew little or nothing came to him to raise money on his pay accounts for months in advance, he introduced him to his own bankers, apparently without words of caution, and directly aided and countenanced a practice which must seriously interfere with an officer's freedom of action and military efficiency. This court can not say that these acts were not prejudicial to good order and military discipline; and accordingly must hold that they are sufficient to uphold the charge.

This court, in *Smith* v. *Whitney* (116 U. S., 167, p. 183), said:

> Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, *whether those acts are done in the performance of military duties or in a civil position, or in a social relation, or in private business.*

And in connection with those remarks the court reviewed several reported cases, among them *In re Poe* (5 B. and Ad., 681, 688), where the charge before a court-martial was in effect failure to take steps as an officer and a gentleman to vindicate his honor and reputation against a charge of stealing coupled with ignominious

treatment. The charge of "conduct to the prejudice of good order and military discipline" was sustained and the accused sentenced to dismissal from the service, the court observing, however, that it did not mean "by its sentence to offer any opinion *as to the original charge of theft.*"

In the case at bar, the court-martial, while unwilling to find the accused guilty of the charge of "conduct unbecoming an officer and a gentleman," which would have required *dismissal from the service* (art. 61), evidently thought that though an *intention* to defraud may not have existed, yet the conduct of the accused throughout the transaction, both before and after it had been brought to the notice of the Secretary of War, was culpable and deserved punishment.

It was the undoubted province of the court-martial to determine whether the facts proved amounted to conduct prejudicial to good order and military discipline within the meaning of the sixty-second article of war. (See Opinion of Court of Claims, Rec., 44–46; also, *United States* v. *Fletcher*, 148 U. S., 84, 91.)

V.

THE OBJECTION COVERED BY FINDING XIV WAS NOT WELL TAKEN.

Finding XIV is as follows (Rec., p. 31):

> The court-martial having reached a finding and having thereupon sentenced claimant upon the charges promulgated in said general court-martial orders, No. 19, and the reviewing officer having referred to the court for trial another set of charges

> alleging fraud and conduct unbecoming an officer and a gentleman, under the sixtieth and sixty-first articles of war, as promulgated in general court-martial orders, No. 20, of 1885, and the court-martial having heard all the evidence for the prosecution therein (except an absent witness, but with a statement as to what such witness would testify to), thus making a *prima facie* case against claimant, and he not having present a defense, the reviewing authority returned the case promulgated in said court-martial orders, 19, to the court for reconsideration and a more severe sentence, with an opinion of the Attorney-General hereinbefore set forth, which proceedings were with closed doors, and of which claimant had no notice at the time.

The court below considered this objection, beginning with the last paragraph of page 42 of the record. *Ex parte Reed* (100 U. S., 13), as it held, is conclusive against the objection, so that it becomes unnecessary for me to defend the regularity of the action of the President and of the court-martial with reference to the various findings as to the proper sentence to be imposed upon the accused. I therefore simply call attention to the fact that the Army Regulations in force at the time contain a provision similar to the one involved in *ex parte* Reed. (See Regulations of the Army of the United States and General Orders in force, 1881, page 91, No. 923.) It is as follows:

> When a court-martial appears to have erred in any respect, the reviewing authority may reconvene the court for a reconsideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, pro-

> ceed to remedy the errors pointed out, and may modify or completely change its findings. The object of reconvening the court in such a case is to afford it an opportunity to reconsider the record for the purpose of correcting or modifying any conclusions thereon, and also to make any amendements of the record necessary to perfect it. Anything like a reopening of the case, by calling new witnesses, or recalling those already examined, is wholly foreign to the proceeding. (G. O., 82, 1872; G. O., 47, 1879.)

The act making appropriation for the support of the Army, etc., approved June 23, 1879 (21 Stats., 34), contained the following provision:

> SEC. 2. That the Secretary of War is authorized and directed to cause all the regulations of the Army and general orders, now in force, to be codified and published to the Army, and to defray the expenses thereof out of the contingent fund of the Army.

This was an implied ratification of these orders, if such were necessary. (Sec. I, Winthrop's Military Law and Precedents, 2d ed., p. 20 *et seq.* and p. 38 *et seq.*)

VI.

THE SENTENCE DEPRIVED APPELLANT OF EMOLUMENTS AS WELL AS PAY.

It is only when an officer of the Army is actually or constructively engaged in the performance of a public service that he is entitled to emoluments (*United States* v. *Phister*, 94 U. S., 219, 223; *United States* v. *Lippitt*, 100 U. S., 663); and, as the necessary effect of the suspension

of appellant from *rank and duty* was to leave him without any public service to perform, the sentence, by necessary implication, cut off his right to emoluments.

It is respectfully submitted that there was no error in the proceedings and that the judgment of the Court of Claims should be affirmed.

JUDSON HARMON,
Attorney-General.

APPENDIX.

Mr. Ingalls, from the Committee on the Judiciary, submitted the following report:

The Committee on the Judiciary, in obedience to a resolution adopted by the Senate on the 7th instant, in the following words:

"*Resolved*, That the Committee on the Judiciary be directed to inquire and report to the Senate as to whether any legislation is required, and if so, what, in regard to the appointment of courts-martial and the regulation of proceedings and practice in trials before such courts in time of peace; and whether, under existing law, an officer may be tried before a court-martial appointed by the President in cases where the commander of the accused officer to be tried is not the accuser,"

respectfully reports:

First. That the attention of the committee has only been called to two topics connected with the question whether any further legislation is required in regard to the appointment of courts-martial and the regulation of proceedings and practice in trials before such courts in time of peace.

Article 79 of the Articles of War (R. S., title 14, ch. 5, p. 238) provides that—

"Officers shall be tried only by general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank."

It has been said, and the committee thinks correctly, that it not infrequently happens that it is substantially impracticable to compose a court-martial of officers superior in rank to the accused, and in such cases it happens that some of the officers who try the accused are inferior in rank to him, and in certain departments of the Army they may consist of those who will necessarily be promoted in case the accused be dismissed. This is inconsistent with the best ideas of the administration of justice, inasmuch as some of the members of the tribunal will be, in a certain sense, gainers by one result of their judgment. It is plain that this state of things ought to be averted in every case possible.

The committee thinks, therefore, that the law in this respect may be usefully amended so as to provide that when officers superior in rank to the accused can not be had to compose the court (and, perhaps, indeed, in all cases in time of peace), the court-martial shall be composed of a certain proportion of judicial officers of the United States, such as circuit and district judges, or, perhaps, of persons composing a part of the supreme judicial courts of the States, so that the court-martial shall contain some members specially trained in the administration of justice, learned in the law, in the practice of courts, and in the rules of evidence.

The committee also thinks that it will be expedient to amend article 94 of the Articles of War (R. S., title 14, ch. 5, p. 239) so as to provide that the court-martial shall have power to regulate the time and duration of its daily sittings.

There are other particulars in which the undersigned think the law and practice of courts-martial might profitably be amended. One of these is the relation of the judge-advocate to the court and the undue advantage given to the prosecution by his presence at its confidential deliberations. It is often the case that the natural

effect of advocacy is to render that officer as zealous in the prosecution of the accused as are prosecuting officers in ordinary criminal cases. His presence at the confidential discussions of the court gives him information as to the state of mind of its members, the impression which particular evidence makes or is likely to make, and their views of the case so far as it has proceeded, thereby giving him an advantage in shaping the subsequent conduct of the case and in the argument, of which the counsel for the defense is deprived. But there is not now time to mature and pass a law correcting these evils.

Second. The committee is of opinion that—

"An officer may be tried before a court-martial appointed by the President in cases where the commander of the accused officer to be tried is not the accuser."

The Constitution of the United States provides (A) that "the President shall be commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States." (Art. 2, sec. 2.)

The Constitution also provides (B) that the Congress shall have power to "make rules for the government and regulation of the land and naval forces." (Art. 1, sec. 8, par. 14.)

The investigations of the committee satisfy it that at the time of the adoption of the Constitution the power of the commander-in-chief of the armies of every civilized country included the power to order and constitute courts-martial for the trial of persons engaged in the military service.

The inquiries of the committee also satisfy it that from 1789 down to this time the President of the United States has, as often as occasion required, exercised this power without serious question from any source.

The Continental Congress, which by the articles of confederation had supreme control of the armies of the United States, as in the place of a single sovereign, provided in its rules and articles of war that general courts-martial *shall* be ordered as often as the cases may require by the general or officer commanding the troops. (Journals of Congress, May 31, 1786.)

This state of things continued until the adoption of the present Constitution (C). Under the present Constitution Congress in 1790 enacted, in substance, that the Continental rules and articles of war should continue in force. (Stat. L., vol. 1, p. 121.)

Again, in 1795, Congress enacted that the troops then raised should be subject to the rules and articles of war then in force. (Stats., v. 1, p. 432, sec. 14.)

Again, in 1796, Congress enacted that sentences of general courts-martial should be laid before the President and passed upon by him. (Stats., v. 1, p. 485, sec. 18.)

Again, in 1798, Congress enacted that all laws then in force for the government of the Army should be continued. (Stats., v. 1, p. 558.)

Again, in 1799, Congress enacted, in the bill to augment the provisional army of the United States, that all laws then in force for the government of the Army should apply. (Stats., v. 1, p. 725.)

Again, in 1802, Congress enacted that the President should have power to appoint judge-advocates for conducting the proceedings of any general court-martial. (Stats., v. 2, p. 136, sec. 21.)

And in 1806 Congress, for the first time under the present Constitution, enacted a code of rules and articles of war, and in this enactment simply provided: First, for the number that should compose a general court-martial; and second, that "any general officer commanding an army, or colonel commanding a separate department, *may* appoint general courts-martial whenever necessary." (Stats., v. 2, p. 367, arts. 64 and 65.)

It thus appears that under the articles of the confederation, there being no President of the United States, the Congress of the States provided that the general commanding the Army *shall* appoint general courts-martial, etc., the supreme executive power then being in the Congress itself, which, as is well known, not infrequently directed the operations of the Army.

Under the present Constitution, when, for the first time in 1806, Congress enacted a code on the subject, it changed the imperative language of the articles of war existing under the confederation, and simply provided that any general officer commanding an army, etc., *may* appoint general courts-martial, thus evidently intending to confer an authority and not to exclude the inherent power residing in the President of the United States under the Constitution.

The substance of this provision has been in force ever since, and from the formation of the Constitution until the present time the committee is advised that the President of the United States has, at all times, when in his opinion it was expedient, constituted general courts-martial.

In this state of the history of legislation and practice and in consideration of the nature of the office of Commander in Chief of the Armies of the United States, the committee is of opinion that the acts of Congress which have authorized the constitution of general courts-martial by an officer commanding an army, department, etc., are, instead of being restrictive of the power of the Commander in Chief, separate acts of legislation, and merely provide for the constitution of general courts-martial by officers subordinate to the Commander in Chief, and who, without such legislation, would not possess that power, and that they do not in any manner control or restrain the Commander in Chief of the Army from exercising the power which the committee think,

in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised.

The committee is also of the opinion that such a power residing in the civil and constitutional commander in chief of the armies of the United States is necessary to the good government and regulation of the Army. It may sometimes happen that the public interest would require a military judicial investigation and trial respecting the conduct of an officer which the officer commanding might not think expedient or choose to direct. In such cases, certainly, the civil and constitutional commander of all the armies, responsible in his civil character for the correctness of his official conduct and bound to take care that the laws be faithfully executed, ought to have the power to constitute general courts-martial in order that justice and good government may prevail.

The committee is also advised that there are some officers of the Army of the United States who, under the present laws and regulations, are not serving under or subject to the orders of any of the officers mentioned in the Articles of War as authorized to constitute general courts-martial, and consequently if any other view of the law were taken than that before mentioned, these officers could not be subjected to any trial whatever by a court-martial.

The committee may add that in March, 1879, acting under a resolution of the Senate, the committee investigated this subject in connection with the matter of Benjamin P. Runkle, and came to the same conclusion that it now reports, although it had not then the time to consider the matter historically so fully as is now set forth.

The committee was unanimous in the conclusion herein reached, with the exception of one member, and his dissent may have rested upon facts in connection with the

detailed organization of the court-martial, and not upon the broad question hereinbefore considered.

All of which is respectfully submitted.

GEO. F. EDMUNDS.
JOHN J. INGALLS.
S. J. R. MCMILLAN.
GEO. F. HOAR.
A. H. GARLAND.
JAMES L. PUGH.

Office Supreme Court, U. S.
FILED.
AUG 29 1895
JAMES H. McKENNEY,
CLERK.

567

IN THE

Supreme Court

OF THE

United States

DAN K. SWEARINGEN, *Plaintiff in Error,*
vs.
THE UNITED STATES, *Defendant in Error.*

Error to the District Court for the District of Kansas, Third Division.

BRIEF FOR PLAINTIFF IN ERROR.

J. D. McCLEVERTY.
FORT SCOTT, KANSAS,
Attorney for Plaintiff in Error.

JEFFERSONIAN PRINTERY, BURLINGTON, KANSAS.

IN THE

Supreme Court

OF THE

United States

DAN K SWEARINGEN, *Plaintiff in Error,*
vs.
THE UNITED STATES, *Defendant in Error.*

Error to the District Court for the District of Kansas, Third Division.

STATEMENT.

At the November term, A.D. 1894, the defendant was indicted in the District Court for the District of Kansas, Third Division, under Section 3893 of the Revised Statutes for the offense of mailing in the postoffice at Burlington, Kansas, a newspaper "containing an article of an obscene, lewd and lascivious nature," as stated in the words of the indictment, charged in three counts, one for mailing one copy of the paper to B. Riggs, another copy of the paper to H. E. Cowgill in the second count, and another copy to J. M. Lane in the third count, all being of the same date, September 21, 1894—pp. 1, 2, 3.

The article was not set out in the indictment because it was alleged to be of "a nature so obscene, lewd and lascivious as to dispense" therewith.

At the adjourned term, on January 3, 1895, a motion to quash the indictment, and each count thereof, was filed — pp. 3, 4, 5, because defective in that—

1. That said indictment did not charge a public offense.
2. That several offenses were improperly joined.

It was overruled.

On January 12, 1895, the defendant was tried and convicted. Motions in arrest of judgment, and for a new trial, were filed and overruled, and thereupon the defendant was sentenced to one year in the Kansas penitentiary, and to pay a fine of $50, and the costs of prosecution—pp. 6, 7.

The bill of exceptions shows that defendant admitted that on September 21, 1894, he was the editor and publisher of "The Burlington Courier, which contained the article referred to in the indictment, but he objected to the introduction of any evidence, for the reason that no public offense was charged in the indictment that there was a misjoinder of offenses therein, and that the words of said newspaper article did not constitute unmailable matter—p. 10. This objection was overruled, and the newspaper article—p. 11—was read in evidence.

There was evidence that a copy of the newspaper was mailed as charged in the first count of the indictment to B. Riggs—p. 12.

As to the second and third counts, for mailing to J. M. Lane and H. E. Cowgill, the only evidence was by Charles Decker—that he and one McCorkell attended to mailing the papers; that the names of J. M. Lane and H. E. Cowgill were on the list as regular subscribers, but sometimes they got their papers at the printing office, and could not say whether they got their papers that week at the printing office or not—pp. 11, 12. By J. M. Lane—That the said newspaper was that week brought to him by his partners' son along with other mail matter, and was addressed to Lane & Kent, and that he did not know whether it came through the postoffice or not—pp. 12, 13. By Charles Decker, also—that this boy frequently got the papers of Lane & Kent at the printing office, but could not say whether he did so that day or not—p. 13.

This was all of the evidence offered to sustain the second and third counts, and defendant moved to strike out all evidence as to the mailing of any paper to J. M. Lane, or to H. E. Cowgill, as charged, which motion was overruled—p. 13.

Some additional evidence as to the identification of the article and the ownership of the newspaper, was offered, and the prosecution rested—p. 13.

Defendant moved the court to compel the District Attorney to elect upon which count of the indictment he would rely, as the evidence showed that all the newspapers were mailed at one time, if at all, and constituted but one offense, if any, being but one transaction. This was overruled. Defendant again moved to strike out all evidence as to mailing newspapers to J. M. Lane and H. E. Cowgill, which was overruled—pp. 13, 14.

Defendant offered no evidence, and the Court charged the jury that "the newspaper article in evidence here, which the defendant admits he published, is *obscene and unmailable matter*, and the only thing for you to pass upon is whether the evidence satisfies you beyond a reasonable doubt that the defendant deposited, or caused it to be deposited in the postoffice at Burlington, Kansas, * * *" The Court further charged as to what a reasonable doubt was, and submitted the case to the jury—p. 14. Proper exceptions were saved as to each ruling of the Court, and the defendant brings the case here, alleging error.

◆◆◆

ERRORS ALLEGED.

The errors alleged are:

1. The overruling the motion to quash.

2. In admitting any evidence under the indictment.

3. In refusing to strike out all evidence as to mailing of the newspaper to J. M. Lane and to H. E. Cowgill as charged in the second and third counts of the indictment.

4. In refusing to compel the prosecution to elect which count would be relied upon.

5. In charging the jury that said newspaper article was obscene and unmailable matter, and in not submitting that as a question of fact to the jury.

6. In overruling motions in arrest of judgment and for a new trial.

ARGUMENT.

1. Is there a misjoinder of offenses, or duplicity of pleading in the indictment?

As a preliminary, the question of duplicity, or misjoinder, should properly be presented. While it is undoubtedly true that where there is doubt as to the purport of an act done, it may be charged in its different phases in different counts, in order to cover the different terms of the statute alleged to have been violated, yet this has never been held to permit the joinder of different things in a single count. Thus in the Ency. of Law, Vol. 4, p. 754: "It is a general rule that "more than one offense cannot be charged in the same count; "that is, a count must not be double, or bad for duplicity. Thus, "one cannot charge the prisoner with having committed a mur- "der and a robbery. Charging two or more distinct offenses in "the same count of an indictment is denominated duplicity, "which is defined as 'multiplicity of distinct matter to one and "the same thing, whereunto several answers are required;' "also as 'alleging for one single purpose or object, two or more "distinct grounds of complaint, or defense, when one of them "would be as effectual in law as both, or all.' Duplicity in crim- "inal pleading is bad. Two or more distinct offenses should in "no instances be joined in one count of an indictment."

Now, section 3893 of the revised Statutes, under which this prosecution is made, declares:

"SEC. 3893. Every obscene, lewd or lascivious book * * "paper * * * or other publication of an indecent character, "and every article or thing designed or intended for the preven- "tion of conception or procuring of abortion, and every article

"or thing intended or adapted for an indecent or immoral use " * * are hereby declared to be non-mailable * *"

The first sentence is in the disjunctive, and declares that "every obscene, lewd or lascivious" book or paper is unmailable, so that if a given book or paper is either obscene, lewd or lascivious, it would be within the condemnation of the statute, and either would be an offense, but in this case the pleader did not allege this article as being either one of the three prohibited kinds, but did allege it as being all three; that is, an article of an "obscene, lewd and lascivious nature"—p. 1.

Now, as before stated, if the pleader had doubts whether any certain language was either "obscene, lewd or lascivious," he could cover the doubt by setting it out in three different counts, but he could not cover that doubt by setting out all three in one count, as was done in this instance. Indeed, the District Attorney very frankly declared in this case that the language of the article was neither lewd nor lascivious, while the Court, in charging the jury, declares it to be obscene only. If this be the correct view, then this indictment is bad for duplicity.

2. Was any offense charged or proved?

It has already been noticed that the newspaper article in question was charged by the indictment to be "obscene, lewd and lascivious," but it was not alleged to be "of an indecent character," as seems to be required by the statute. It declares that every obscene, lewd or lascivious book, paper, or picture "*of an indecent character*," is non-mailable matter. Of course it is quite conceivable that a picture, standing alone and by itself, might appear lewd or lascivious, and yet when placed in a work on surgery, and necessary to illustrate some surgical operation, no one would for a moment consider it to be in the least degree indecent, so that the true meaning of the statute would seem to be the indecency of the thing declared against, and that unless it is both alleged and shown to be "of an indecent character," there would be no offense. Hence it follows that as neither count of this indictment charges this newspaper article as being

"of an indecent character," the legitimate inference must be in the light of the strictness required in criminal pleadings, that it was of an entirely decent and *proper character*, and not within this statute.

So, too, when the language of this newspaper article is examined, it will be found not to be within this statute. From the very first it has been held that this statute, by the use of the terms "obscene, lewd or lascivious," meant that the language used must be such as would excite sexual desires or libidinous thoughts. It is not sufficient that the language used may be coarse, vulgar, or even libelous. Such language is denounced in the preceeding section, when written on the outside of any envelope, cover, or wrapper, or upon any postal card, and evidently was not intended to be covered by Section 3893.

If this indictment is not bad for duplicity, then it is because the words "obscene, lewd or lascivious," as used in the statute, are intendad, as all, to be descriptive of the idea intended to be condemned, and it must be admitted that there is room for this construction, but if this is so, then in view of the fact that all three of the words are used in this indictment, the meaning must be that language such as will incite immorality, or libidinous thoughts, is that presented by the indictment. The article, as shown in the Record, p. 4 11, shows by its face to be a bitter personal attack by one editor upon another during the excitement of a political campaign. The person assailed is charged with being "the red-headed mental and physical bastard that flings filth under another man's name down on Neosho street" as "a liar, perjurer and slanderer who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour, and who would pimp and fatten on a sister's shame with as much unction as a buzzard gluts in carrion." "He has been known as the companion of negro strumpets, and has reveled in lowest debauches;" "he lies faster than ten men could refute, and for what? "A little Republican slush money! He is lower, meaner, filthier, rottener, than the rottenest strumpet that prowls the street by night "

That this language is extremely abusive, even libelous, there can be no doubt, but it certainly has no tendency to excite sexual immorality, or libidinous thoughts. To apply to a woman the epithet of being a prostitute, is very coarse, and abusive, but is not within this statute, while to write soliciting an assignation doubtless would be, and this is the distinction made by the courts:

"The term 'indecent' in Section 3893, R.S., means immodest, impure, and language which is coarse or unbecoming, or even profane, is not within the inhibition of the act." United States vs. Smith, 11 Fed. Rep., 663.

This case reviews the legislation upon this subject, and shows that originally anything of a "vulgar and indecent character" was made non-mailable, but finally the word "vulgar" was dropped and "indecent" alone retained, which would seem necessarily to mean that the only language within the statute is not that which may be coarse, vulgar or abusive, but such as suggests moral or sexual impurity.

"The test which determines the obscenity, or indecency, of a publication, is the tendency of the matter to deprave and corrupt the morals of those whose minds are open to such influences."

United States vs. Rebout, 28 Fed. Rep., 522.

"A letter, although exceedingly coarse and vulgar, and exceedingly libellous, imputing to the person an atrocious crime, but which has no tendency to excite libidinous thoughts or impure desires, or to deprave and corrupt the morals of those whose minds are open to such influences, is not 'obscene, lewd, or lascivious,' within the meaning of the first clause of Section 3893 of the Revised Statutes, defining non-mailable matter." United States vs. Wightman, 29 Fed. Rep., 636

"A letter, in which the person to whom it is addressed, is called 'a son of a bitch,' does not render the sender liable under the Revised Statutes of the United States, Section 3893." United States vs. Durant, 46 Fed. Rep., 755.

See also United States vs. Slenker, 32 Fed. Rep., 693.

United States vs. Bennett, 16 Blatclef, 362.

United States vs. Clarke, 38 Fed. Rep., 500.

United States vs. Males, 51 Fed. Rep., 41.

These cases are not conclusive upon this Court, but they show the tendency of the decisions, as none of a different import seem to have yet been reported. The case last cited contains a careful review of the authorities, and shows that all agree upon the definition here contended for.

This indictment charges that the defendant "unlawfully and knowingly" mailed this newspaper, but does not charge that he had any knowledge that it contained non-mailable matter. In other words, no scienter is alleged, and this is a necessary averment.

The indictment in United States vs. Slenker, 32 Fed. Rep., 693, is almost an exact copy of the indictment in this case, and it was held bad after conviction; and a motion in arrest of judgment sustained; and this upon the authority of United States vs. Carll, 105 U. S., 611; United States vs. Cruikshank, 92 U. S., 542; See also United States vs. Rebout, 28 Fed. Rep., 552-3.

Is the character or import of the language a question of fact for the jury?

It will be noticed that the Court charged as a matter of law that the language of this newspaper article was obscene, and that the only question for the jury to pass upon was whether the defendant mailed it or not. It seems necessary to charge that the matter mailed is obscene, and also to prove it by proper evidence, and anything of which evidence must be given, would seem of necessity to be a question of fact for the jury. A statute may make the stealing of a horse larceny, but under such a statute it would certainly be necessary to allege and prove that it was a horse that was taken, and unless the jury should so find as a fact, there could be no conviction. The language used might be very near the border line, and individuals might differ as to whether it was within the statute, as is well

illustrated by the cases already cited, hence the opinion of the jury would be highly necessary in the determination of that fact; and to deny the defendant this right must be error.

In United States vs. Clarke, 38 Fed. Rep., 500, before cited, Judge Thayer, now of the ~~Circuit~~ Bench, in discussing this matter, shows it always to have been a question of fact for the jury, and says: "In the first place, I remark that the words 'obscene,' 'lewd,' 'lascivious,' and 'indecent,' as used in the Federal Statute, Section 3893, as amended by act of September 6, 1888, have the meaning that have been imputed to them at common law in prosecutions for publishing obscene libels. Whether a particular publication is obscene, and for that reason unmailable, must be determined by common-law tests. At this point, however, arises the question whether it is the province of the Court or jury to determine, with respect to a given publication, if it is obscene or otherwise. I am of the opinion that the ultimate solution of that question rests with the jury to the same extent that in civil prosecutions for libel, and in criminal prosecutions since the Declaratory Act of 32 Geo. III., C. 60, the question whether an article is libelous is for the jury, under proper instructions given by the court. Parmiter vs. Coupland, 6 Mees. & W., 105; Baylis vs. Lawrence, 11 Adol. & E., 920; 3 State Tr., 37; Moxson's case, 2 Towns. St. Tr., 356; Starkie, Sland. and Lib., (Wood's Notes) §§ 556 and 195. The Court, of course, must define the terms 'obscene,' 'lewd' and 'lascivious,' as used in the statutes, and may no doubt express its opinion as to whether the publication complained of is indecent, but in the end the jury must find whether the publication, by reason of its effect upon the minds of those into whose hands it may fall, is obscene or otherwise, within the definition given by the court. * * * The views that different persons might entertain of the tendency and effect of such publications, are so various that these questions ought to be submitted to a jury."

See also United States vs. Rebout, 28 Fed. Rep., 522, where the charge is given distinctively submitting the question to a jury.

5. Should the motion to elect and strike out all evidence as to the second and third counts have been sustained?

As before shown, there was really no evidence as to the second and third counts, yet the Court refused to compel the District Attorney to elect upon which count he would stand, and refused to strike out all evidence as to those counts. The effect of this was the same as telling the jury that there was proper evidence to sustain those counts, though evidently all was but one transaction, and in fact the jury found the defendant guilty generally, which of course meant guilty under all three of the counts.

Now, only one witness testified as to obtaining the newspaper, described in the first count, out of the postoffice, and it may well have been that some of the jurors may not have believed him because of his demeanor upon the witness stand, or toherwise, but accepting the intimation of the Court as to the other counts, inferred from his overruling of the motion to strike, a verdict of guilty might thus be reached. In fact, the Court treated it as a verdict of guilty upon one count only, but the inference is otherwise as to the jury, and a verdict may in this manner have been reached, when otherwise it might not.

No further discussion will be offered except to suggest that under a statute like this, where a citizen may receive so extreme a punishment as was given in this case, at least reasonably strict rules should be enforced, and the statute and rules of pleading not extended beyond their fair meaning in order to secure or uphold a conviction. It is enough to say that Congress has not yet made this language penal, however abusive and full of epithet it may be, nor does any legal enactment relieve from the usual necessity of distinct and clear pleading in the indictment. It seems harsh that a mere quarrel between two editors should visit such severe punishment upon one who may really

be the least of the two offenders, and one is lead to at least wonder whether one who feared to prosecute for libel where the jury would judge both the law and the fact, might not be seeking private vengeance under the guise of a prosecution for mailing non-mailable matter.

FORT SCOTT, KANSAS, August 15, 1895.

J. D. McCLEVERTY,
Attorney for Plaintiff in Error.

FILED.
MAR 28 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1894

No. 970

IN THE MATTER OF THOMAS THOMAS, CLAIMANT OF THE STEAMSHIP "DELAWARE" FOR A WRIT OF CERTIORARI IN THE SUIT OF THE STEAMSHIP "DELAWARE," THOMAS

Claimant-Appellant

against

CHARLES H. WINNETT AND OTHERS

Libellants-Appellees.

MEMORANDUM IN OPPOSITION TO PETITION

HARRINGTON PUTNAM

Advocate

EVENING POST JOB PRINTING HOUSE, 156 FULTON STREET.

To the Honorable the Supreme Court of the United States: 1

On behalf of Charles H. Winnett and others, this memorandum is respectfully submitted, in reply to the petition of Thomas Thomas for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit.

First.—The decision of this cause in the first instance is reported at 61 Fed. Rep., 525. No new proofs and no amendment of pleadings have been had. In the Circuit Court of Appeals, after a patient hearing of appellant's counsel, the Court declined 2
to hear counsel for the appellees in support of the merits of the decree below. The Court certified to this Court the question raised as to the effect of the Act of February 13, 1893, and the certificate has been docketed and numbered 941 on the present calendar. On March 25th, instant, this Court granted a motion to advance the cause.

Second.—The merits of the collision turn on a question of fact. The steamship *Delaware*, coming in from sea in charge of a pilot, emerged from a rain squall at a point to the northeastward of Ged- 3
ney's Channel and about three-fourths of a mile distant. She then headed to enter the channel on a course angling with the proper channel course of about three and three-fourths points. The channel is eleven hundred feet wide, and ordinarily as soon as a steamer passes within the buoys, she would steer her course along the starboard or eastern side of the channel keeping toward the red buoys.

4 The tug *Talisman* was crossing the channel diagonally on a course of S. S. E. with the station pilot boat in tow astern. After the *Delaware* got within the buoys, by a surprising oversight the pilot permitted her to keep on across the axis of the channel, finally colliding with the tug on the westerly half of the channel.

THIRD.—The *Delaware* was not embarrassed by other vessels. Her fault was due to the neglect of the pilot to note that the tug was approaching, as his attention was on the black buoys and other objects on the port bow. The master suddenly rushed on the bridge and interposed, ordering
5 the helm to be put hard astarboard, under which the steamer swung off to the southwestward about two or three points. The question in the courts below really was whether, admitting the *Delaware's* primary fault (which was indefensible), the navigator of the tug could reasonably have expected that the *Delaware* would have left her own side of the channel and finally have sheered two or three points into and across to the left side of the fairway. The issue was, on which part of the channel did the collision occur, and how much did the *Delaware* swing under the final starboard helm?

6 FOURTH.—The District Judge found that the *Delaware* did continue on her angling course to the western side of the channel, and that in the situation such a proceeding was entirely unexpected.

Judge Benedict said:

"The situation justified the pilot of the tug in supposing that the steamtug would go under his stern or stop, and repelled any supposition that the steamtug would pass ahead of him and over to the western side of the channel" (fol. 668).

Not only was the tug sustained in keeping on, but 7
the Court also decided that to stop would have been
a fault.

FIFTH.—An inspection of the blue-print diagram presented by appellants to the learned Judges of the Circuit Court of Appeals (appended hereto) really confirmed these conclusions of fact. By this diagram as originally made, a change of barely two points would have taken the *Delaware* all clear. By the libellant's alteration in dotted lines,—placing the *Delaware* nearer the red buoy at the east side of the channel to conform to the pilot's evidence—even that slight change would be unnecessary, and the *Delaware* would have passed safely astern, by merely 8
keeping her course.

SIXTH.—The contention that the *Delaware* did not swing off to the western side of the channel, as her own master said (fols. 204, 205), was the main issue of fact in the Circuit Court of Appeals. After hearing the full presentation of appellant's side of that contention, the Court declined to hear the opposite counsel.

SEVENTH.—Even before the *Britannia*, 153 U. S., 130, and the *Breakwater*, 155 U. S., 263, it had always been held that in narrow channels it was obligatory to keep to the starboard side (Rule 21), 9
and if the starboard hand rule also applied to keep the course *and speed* toward that side. No case cited by the appellant's counsel has held that a tug with a stern tow crossing a fairway diagonally should slow and stop, thereby closing and intercepting the proper course of the other vessel along her own starboard side of the channel.

EIGHTH.—The point first made in the appellate court that the tug's single blast (which the *Delaware's* pilot did not hear) obliged the tug then to port

10 her helm, hardly needs reply. The statute made it the tug's duty to keep her course, whatever whistles were blown. These whistles did not mislead those on the *Delaware*. In fact, no such fault was pleaded in the answer.

In the *City of New York*, 147 U. S., 85, the Court said:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel."

The fault of the *Delaware* in the case at bar has
11 always been too obvious for serious discussion.

NINTH.—The only questions of general interest in this case have already been certified to this Court. There are no other points that can be termed questions of law. The Court below has asked this Court in substance: Are the owners of the *Delaware* relieved from liability for a collision occurring solely by the fault of her pilot, through the phraseology of the act of Congress of February 13, 1893? Revolutionary and subversive of the settled maritime law as is the exemption set up, counsel prayed that his proposition be certified in order that an early construction of the statute should be declared by this Court.
12 Such a certification and final decision is desirable in the general public interest of shipowners and carriers. When points of law are thus judicially stated and the high jurisdiction of this Court invoked under the statute, the certificate should not be made a vehicle to bring up and burden this Court also with the discussion and rehearing of the facts of an ordinary collision cause in, which two Courts have carefully weighed the evidence and found all the issues against the appellant.

It is respectfully submitted that to grant the writ would be to bring up from the Circuit Court of Ap-

peals to this Court mere questions of fact on which 13
four judges of experience have unanimously agreed. If it had any effect at all, it would tend to obscure the clear and deliberate statement and finding of fact which, under the statute, the Court below has already made. It would inevitably establish an inconvenient precedent in future causes brought to this Court by certificate.

Dated New York, March 26, 1895.

HARRINGTON PUTNAM,
Advocate for Charles H. Winnett
and others, Appellees.

10 her helm, hardly needs reply. The statute made it the tug's duty to keep her course, whatever whistles were blown. These whistles did not mislead those on the *Delaware*. In fact, no such fault was pleaded in the answer.

In the *City of New York*, 147 U. S., 85, the Court said:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel."

The fault of the *Delaware* in the case at bar has
11 always been too obvious for serious discussion.

NINTH.—The only questions of general interest in this case have already been certified to this Court. There are no other points that can be termed questions of law. The Court below has asked this Court in substance: Are the owners of the *Delaware* relieved from liability for a collision occurring solely by the fault of her pilot, through the phraseology of the act of Congress of February 13, 1893? Revolutionary and subversive of the settled maritime law as is the exemption set up, counsel prayed that his proposition be certified in order that an early construction of the statute should be declared by this Court.
12 Such a certification and final decision is desirable in the general public interest of shipowners and carriers. When points of law are thus judicially stated and the high jurisdiction of this Court invoked under the statute, the certificate should not be made a vehicle to bring up and burden this Court also with the discussion and rehearing of the facts of an ordinary collision cause in, which two Courts have carefully weighed the evidence and found all the issues against the appellant.

It is respectfully submitted that to grant the writ would be to bring up from the Circuit Court of Ap-

peals to this Court mere questions of fact on which 13
four judges of experience have unanimously agreed. If it had any effect at all, it would tend to obscure the clear and deliberate statement and finding of fact which, under the statute, the Court below has already made. It would inevitably establish an inconvenient precedent in future causes brought to this Court by certificate.

Dated New York, March 26, 1895.

HARRINGTON PUTNAM,
Advocate for Charles H. Winnett
and others, Appellees.